SUPREME COURT, U. S.

No. 73-806

NOV

MICHAEL ROD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL PETROLEUM REFINERS ASSOCIATION, ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners (two trade associations and thirty-four petroleum refining companies) pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 27, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 482 F.2d 672 and is reproduced in the Appendix herein at A-30-101. The opinion of the District Court for the District of Columbia is reported at 340 F.Supp. 1343 and is reproduced in the Appendix herein at A-16-29. The Octane Posting Trade Regulation Rule of the Federal Trade Commission

("FTC" or "Commission"), with the Statement of Basis and Purpose, is reported at 16 C.F.R. § 422.1 and is reproduced in pertinent part in the Appendix herein at A-14-15.

JURISDICTION

The judgment and opinion of the Court of Appeals (A-30-101) were entered on June 27, 1973, and its further order denying rehearing (A-104) was entered on August 6, 1973. The time for filing this petition for a writ of certiorari was extended to and including November 20, 1973, by order of Chief Justice Burger dated October 26, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did Congress, when it enacted the Federal Trade Commission Act of 1914, grant the Federal Trade Commission the statutory power to enforce the general prohibition of that statute by making substantive trade regulation rules having the force and effect of law?

STATUTE INVOLVED

Because this case involves the statutory meaning of Sections 5 and 6 of the Federal Trade Commission Act of 1914, we have set forth in the Appendix herein (A-1-13) those two sections of the Act as they originally appeared when the statute was enacted in 1914, 38 Stat. 719-22, and as they now appear with amendments in 15 U.S.C. §§ 45-46.

STATEMENT OF THE CASE

This case presents for the first time the very important legal question of whether the Federal Trade Commission

is authorized by its enabling act of 1914 to promulgate trade regulation rules having the binding effect of law.

Octane Posting Rule. On July 30, 1969, the FTC announced a proposed Trade Regulation Rule requiring the posting of "research" octane ratings on gasoline pumps at service stations (34 Fed. Reg. 12449). Under the proposed Rule, the failure to make such postings would constitute an "unfair method of competition" and a "deceptive act or practice" in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

The Commission staff attorneys then conducted preliminary administrative proceedings in which they received statements from interested parties who were neither under oath nor subject to cross-examination (CA App. 82).[1] Based upon these statements as well as matters outside the public record, the Commission, on December 30, 1970, issued the Octane Posting Rule requiring compliance within six months (36 Fed. Reg. 354).

On March 29, 1971, petitioners filed this lawsuit challenging both the Commission's authority to issue the Rule and the procedures used in its adoption (CA App. 1-28). Two weeks later the Commission postponed the effective date of the Rule and reopened the proceeding on the ground that it had received information questioning the "reliability" of the method of rating octane it had selected (36 Fed. Reg. 7309).

Without holding any further hearings, the Commission, on December 16, 1971, issued a revised Octane Posting Rule (A-14) requiring the posting of the "minimum octane number," a figure obtained by averaging two separate methods of octane determination (36 Fed. Reg. 23871).[2] This revised Rule, with an effective date of

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[1] "CA App." refers to the printed Appendix in the Court of Appeals, a copy of which has been lodged with the Clerk.

[2] The octane rating relates solely to the anti-knock characteristic of gasoline and of itself provides no measure of the overall

March 15, 1972, would require gasoline refiners and others who sell gasoline to retailers to adopt procedures for determining "minimum octane numbers" for posting on gasoline dispensing pumps located throughout the country (A-14).

The District Court's Opinion. On cross-motions for summary judgment, the District Court (Robinson, J.) was asked to decide the question of whether the Commission, under its 1914 enabling statute, is empowered to promulgate substantive rules of law or, as it calls them, "trade regulation rules."[3] In its opinion, the District Court initially considered (A-18-21) the Commission's basic argument that it was explicitly granted substantive rulemaking power under Section 6(g) of the FTC Act, which empowered the Commission "[f]rom time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act" (A-6).

The Court pointed out, however, that "both the context of Section 6(g) and the legislative history accompanying it demonstrate that this particular authority was not, nor has it been, granted" (A-19). Based upon its detailed review of the legislative history, the Court concluded that Section 6(g) was "intended only as an authorization for internal rules of organization, practice, and procedure" (A-19).

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quality of gasoline; gasoline quality is measured under industry standards by at least a dozen variables (CA App. 48-49, 99-100, 124-27).

[3] In addition to challenging the authority of the Commission to issue the Octane Posting Rule, the complaint in this action charged that the procedures used by the Commission in promulgating the Rule violated the requirements of due process of law, that the claimed delegation of substantive rulemaking authority by the Commission was such as to constitute an unlawful delegation of legislative power by Congress, and that the official record compiled in this proceeding before the Commission did not support the Rule (CA App. 1-28). Since the District Court decided the case on the basis of the Commission's lack of authority, it did not reach the other three contentions raised by plaintiffs below (A-17).

The Court first observed that Section 6(g) "originated in Section [8] of the House Bill of 1914 that conferred only investigative powers on the Commission" and, accordingly, that this provision "could only have been intended as an adjunct to the Commission's investigative powers" (A-19). In the Senate version of the FTC Act, which conferred adjudicative powers on the Commission, Section 6(g) was not included and thus the bill that passed the Senate "made no provision whatever for the promulgation of rules and regulations in any context" (A-19).

Thus, when the legislation reached the Conference Committee, the House-passed bill, dealing with investigative powers, contained the provision equivalent to Section 6(g) and the Senate-passed bill contained no rulemaking provision at all (A-19-20). Since it is settled under the parliamentary procedures of both Houses of Congress that the Conference Committee is not permitted to add new provisions or powers to a statute, the District Court concluded that Section 6(g) of the FTC Act could not have been enlarged in conference to grant the Commission substantive rulemaking authority (A-20, n. 12). Moreover, as the Court noted, during the course of the 1914 legislative process, "Congress refused to amend its proposals on two separate occasions that would have granted the Commission the very rulemaking power it now seeks to exercise" (A-20).

The District Court also considered the various statutory grants by Congress of substantive rulemaking authority to federal administrative agencies and concluded that the FTC, unlike other agencies, was not endowed with affirmative regulatory duties or powers, but was established as a quasi-judicial agency (A-18, 26-27, n. 32). The Court further rejected the Commission's attempt to analogize the FTC's powers to those of other agencies, pointing out that the FTC's function is "materially distinct from other administrative bodies" (A-18).

Further, in reviewing the six discrete instances where Congress, subsequent to 1914, had specifically granted substantive rulemaking power to the Commission in separate statutes (A-22-24), the Court stated that "where Congress intended to grant sustantive rulemaking authority to the FTC, it has done so clearly and unequivocally" (A-22).

The District Court observed, too, that the power to issue substantive rules would entail the power to "prescribe substantive law in such a manner as to vitiate the substantial procedural safeguards specified in the Act itself" (A-22). Therefore, the Court said, if Congress in fact had given such power to the Commission, it had done so without any procedural safeguards or even any guidelines as to how it was to be exercised. Since the reference to rules and regulations in Section 6(g) stands alone without any other reference to "this extraordinary grant" of power, the Court reasoned that this fact "lends credence to the conclusion that the Commission has no substantive, legislative rulemaking authority" (A-22).

Finding the Commission's argument that Section 5 impliedly granted rulemaking authority "patently untenable," the District Court stated: "If the legislative history of the Act will not permit the issuance of Trade Regulation Rules under the only section explicitly granting the Commission rulemaking authority, such sweeping authority cannot be based upon an implied grant of power in some other section of the Act or in the Act as a whole" (A-26).

The District Court also took cognizance of other facts —that the Commission in its first half century of existence had "never asserted the authority it claims to have always possessed"; that in fact "the Commission itself has repeatedly admitted that it has no power to promulgate substantive rules of law"; and that "many of the legal commentators" have independently reached the same conclusion (A-22, 27-28).

Based on this opinion, the District Court granted summary judgment to the plaintiffs and adjudged the Octane Posting Rule "null and void" (CA App. 157) since the FTC Act of 1914 "does not confer upon the Federal Trade Commission the authority to promulgate Trade Regulation Rules that have the effect of substantive law" (A-29). On May 8, 1972, the Commission filed a notice of appeal.

Decision of the Court of Appeals. On review, the Court of Appeals (Bazelon, Chief Judge, Wright and Robinson, Circuit Judges), in a 74-page opinion written by Judge Wright, reversed the opinion of the District Court and held for the first time that the FTC Act of 1914 conferred substantive rulemaking power on the Commission (A-30-77).[4] As the basis for its decision, the Court of Appeals relied on the "clear" and "plain" language of Section 6(g) authorizing the Commission "to make rules and regulations for the purpose of carrying out the provisions of this Act" (A-38, 54, 55, 61, 65, 68, 77).

While invoking the plain meaning doctrine of statutory construction, the Court elsewhere in its opinion admitted that Section 6(g) was "arguably ambiguous" and indeed susceptible to the opposite construction (see A-54, 64-65, 75). Specifically, the Court acknowledged that the District Court's construction of Section 6(g) as authorizing the Commission only to issue rules of procedure and practice was not "implausible" (A-54; also A-36-40), but it rejected that construction as being "crabbed" and "inhospitable" (A-45, 72) in favor of a "liberal" and "expansive" construction of the words in Section 6(g) (A-40, 44, 55, 65).

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[4] The opinion includes a 25-page appendix reviewing the legislative history of the FTC Act of 1914, with particular reference to Section 6(g) of that Act (A-78-101).

Turning to the legislative history of the 1914 Act, the Court of Appeals admitted its relevance in interpreting Section 6(g) (A-55), but concluded on the basis of its own review that it was "ambiguous" and "indecisive" (A-54, 55, 68, 78) and, in any event, not sufficient to "compel the conclusion" that the Commission was not meant to have substantive rulemaking authority (A-54).

Similarly, the Court was "not disturbed by the fact that the agency itself did not assert the power to promulgate substantive rules until 1962 and indeed indicated intermittently before that time that it lacked such power" (A-68, notes omitted). While admitting that "the accustomed judicial practice is to give 'great weight' to an agency's construction of its own enabling legislation, particularly when such a construction stretches back, as here, to a time close to the agency's origin," the Court below found that such judicial deference was not required in this instance where "the question is simply one of statutory interpretation" of the Commission's enforcement authority (A-70, citations omitted).

The Court of Appeals, however, found as a "more troubling obstacle" to the Commission's position "the argument that Congress was made fully aware of the formerly restrictive view of the Commission's power and passed a series of laws granting limited substantive rulemaking authority to the Commission in discrete areas allegedly on the premise that the 1914 debate withheld such authority" (A-72). But the Court rejected the argument of *de facto* ratification through Congressional acquiescence in administrative construction as "unwise," since it believed that Congress might have enacted the legislation "out of caution and to eliminate the kind of disputes that invariably attend statutory ambiguity" (A-75). By way of conclusion, the Court of Appeals stated that it felt confident that if Congress believed that the Court's construction of the statute gave the Commission "too much power, it will repeal the grant" (A-75).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals below, in construing the FTC Act of 1914 as conferring authority on the Commission to enforce that statute by use of substantive rulemaking, warrants review by this Court for three reasons:

First, this case presents a very important issue of first impression with respect to the authority of the Commission to promulgate substantive rules of law. In construing the 1914 enabling act as granting legislative-type rulemaking authority to the FTC some 60 years after the creation of that agency, the Court below has authorized the use of a method of enforcement that will radically alter the procedures used by the Commission in administering the prohibitions of the FTC Act—prohibitions which are among the broadest delegations of power by Congress ever made to an administrative agency and which affect the entire American economy.

Second, the Court below exceeded its judicial function in construing the FTC Act as authorizing substantive rulemaking, since neither the wording of that statute nor its legislative history grants such extraordinary enforcement power to the Commission. Indeed, the structure and language of the pertinent sections of the 1914 Act as well as the specific legislative history demonstrate that Congress did not intend the Commission to enforce the statute by substantive rulemaking.

Third, this Court needs to settle, once and for all, the legal question of the Commission's authority to issue substantive rules of law and thereby put to rest the controversy and confusion, both in Congress and among the business community, that surrounds the exercise of this authority by the Commission. If this issue is not finally determined at this time, the uncertainty will continue and actions by Congress and the courts will be taken on the basis of doubts with respect to the Commission's authority.

I

THIS CASE PRESENTS A NEW AND MOST SIGNIFICANT QUESTION INVOLVING THE ADMINISTRATION OF THE FEDERAL TRADE COMMISSION ACT

When Congress created the Federal Trade Commission as a quasi-judicial agency in 1914, it did so because it was dissatisfied with the administration of the antitrust laws.[5] In the 1914 enabling statute, Congress directed the Commission to prevent "unfair methods of competition" in interstate and foreign commerce (A-1). This mandate is one of the broadest, if not the broadest, delegations of authority by Congress to a federal administrative agency.[6] As the Court below acknowledged, the Commission's "expansive" jurisdiction "cuts deeply into and, with limited exceptions, widely across virtually all of American business" (A-52, note omitted).

In the same 1914 statute, Congress carefully spelled out in great detail the method by which the statute was to be enforced by the Commission. In Section 5, it not only set forth the necessity of issuing a complaint, holding hearings, making findings of fact, and issuing a written report and a cease and desist order, but it also included detailed provisions for judicial review in the courts of appeals and the Supreme Court, the entry of final orders, and the penalties for violation as well as the method by which violations shall be established (A-1-4).

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[5] For the legislative background of the 1914 statute, *see generally* HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY OF ADMINISTRATIVE LAW AND PROCEDURE (1924); CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS ch. IV(B) (1941); and *Holloway* v. *Bristol-Myers Corp.*, 1973-2 Trade Cases ¶ 74,623, at 94,751-53 (D.C. Cir. 1973).

[6] In 1938, the Congress further broadened the Commission's mandate to prevent "unfair or deceptive acts or practices." 52 Stat. 111, 15 U.S.C. § 45; see *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972).

From 1914 to 1962, the FTC faithfully enforced the statute in accordance with the specific procedures provided by Congress in the enabling act (A-54, 68, 71, n. 29).

Now, almost 60 years after the passage of the 1914 enabling act, the Court of Appeals below for the first time reads that statute as "implying" that the Commission has a new and alternative method of enforcement, namely, legislative-type, substantive rulemaking (A-76, n. 40). In doing so, the Court authorizes the Commission to issue broad trade regulation rules having the effect of law without any of the procedural protections specified in the statute. Thus, by this single act of statutory interpretation, the Court below has granted the Commission a new enforcement power that will drastically alter the administration of the FTC Act.[7]

Enforcement by trade regulation rulemaking represents a radical departure from administrative adjudication. Instead of proceeding against individual respondents for past business conduct, the Commission now claims the right to enforce the FTC Act by promulgating general rules proscribing future conduct applicable to entire industries on a nationwide basis. As the Commission admitted in its brief in the Court below:

> "Such trade regulation rulemaking is not adjudicative in character. It is not a proceeding to determine whether or not particular persons or companies have violated the laws administered by the Commission. It is prospective, not retrospective, in its appli-

[7] A misconception that pervades the opinion below is that rulemaking merely "implements" or "supplements" adjudication and, therefore, is somehow subsumed in the existing adjudicatory powers of the Commission (A-34, 36, 40, 63, 66). This is simply not the case. It is well recognized that administrative adjudication and rulemaking are separate and alternative modes of enforcement to give content to the general statutory prohibitions of an act. For a statement of the basic differences in these modes of administrative enforcement, see the excellent article by Professor Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

> cation. Its purpose is to determine for the future whether certain business practices, if followed by the members of an industry, would be unlawful" (FTC Br. 5).

Apart from its virtually unlimited scope and application, the FTC's trade regulation rule procedure contains none of the procedural safeguards of administrative adjudication. In an FTC rulemaking proceeding, the affected parties do not have the right to examine or cross-examine witnesses, to introduce evidence, or to receive the protections of any of the other attributes of due process. No attempt is made to adhere to the rules of evidence and no sworn testimony is received. Moreover, in promulgating a trade regulation rule, the Commission need not confine itself to the official record, but, as Section 1.12 of its Rules provides, the Commission may rely on "knowledge derived from studies, reports, investigations, hearings, and other proceedings" (16 C.F.R. § 1.12).

Moreover, a trade regulation rule need not be based upon findings of fact. The affected parties in consequence are never informed of the full range of considerations which may have influenced or determined the Commission's action in issuing a rule. And after the Commission promulgates a trade regulation rule, there is no effective judicial review of the merits of the rule, since the FTC Act only provides for judicial review of final orders to cease and desist (A-10-11).

No court has ever imputed such an extraordinary grant of enforcement power, without procedural safeguards, to an administrative agency. Significantly, Congress has granted legislative-type, substantive rulemaking power to other federal agencies, but in each such case it has used explicit language in the statute (1) authorizing the use of rulemaking power and (2) spelling out the precise legal effect of such rules in terms of statutory penalties. Further, Congress has confined the granting of substantive rulemaking power to agencies possessing per-

vasive regulatory authority over specific industries such as transportation (ICC), airlines (CAB), natural gas and electric power (FPC), communications (FCC), securities (SEC), and the like.

For example, Sections 154(i), 201(b), 303(f), 303(j), 303(r), and 317(e) of the Federal Communications Act (47 U.S.C. §§ 151 *et seq.*) specifically authorize substantive rulemaking, and Section 213(f) of the statute provides, "all rules and regulations made by the Commission for the purpose of administering this section shall have the full force and effect of law." Further, Section 312 (a)(4) provides: "The Commission may revoke any station license or construction permit . . . for willful or repeated failure to observe any . . . rule or regulation of the Commission authorized by this chapter . . ." (47 U.S.C. § 312(a)(4)).

Even in the case of the FTC, Congress on six separate occasions has seen fit to enact specific legislation granting the Commission specific legislative-type rulemaking authority in the regulation of specific products. In the Wool Products Labeling Act of 1939, the Fur Products Labeling Act of 1951, the Flammable Fabrics Act of 1953, amended in 1967, the Textile Fiber Products Identification Act of 1958, and the Fair Packaging and Labeling Act of 1966, all of which deal with product labeling and packaging, subjects clearly within the substantive reach of Section 5, Congress specified the particular subjects upon which the Commission was authorized to issue substantive rules and regulations. Further, Congress specified in each of these statutes that business conduct violative of the rules and regulations of the Commission shall constitute an "unfair method of competition" or a "deceptive act or practice" within the meaning of Section 5 of the FTC Act.[8]

[8] Wool Products Labeling Act, 15 U.S.C. § 68a; Fur Products Labeling Act, 15 U.S.C. §§ 69a(a), (b), (c); Flammable Fabrics Act, 15 U.S.C. § 1194(c); Textile Fiber Products Identification Act,

Thus, it is evident that where Congress has intended to grant substantive rulemaking power to a federal agency, it has done so in clear and unequivocal terms. In this case, the Court below, by inferring such an extraordinary grant of power, has authorized the Commission to enforce the statute with the broadest substantive mandate—affecting the entire economy of the nation—without any of the procedural protections ordinarily associated with the exercise of such power. Not only will this decision substantially change the administration of the FTC Act, but it will affect the rights and obligations of those affected by the statute. Accordingly, we submit that this Court should review the statutory construction of the Court below (which it recognized to be an "important" one, A-31) to determine whether it is in accord with the original intent of Congress when it enacted the FTC Act in 1914.

II

THE DECISION BELOW IS BASED ON A MISREADING OF THE FTC ACT AND ITS LEGISLATIVE HISTORY AS WELL AS AN APPROACH TO STATUTORY INTERPRETATION THAT EXCEEDS THE PROPER BOUNDS OF THE JUDICIAL FUNCTION

The entire reasoning process of Judge Wright's opinion below proceeds from a basic and false premise, namely, that the "plain language" of the FTC Act confers legislative-type, substantive rulemaking power on the Commis-

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15 U.S.C. §§ 70a(a), (b), (c); Fair Packaging and Labeling Act, 15 U.S.C. § 1456(b). The sixth statute involved the so-called "quantity limit" rule contained in Section 2(a) of the amended Clayton Act, 15 U.S.C. § 13(a).

In 1941, when Congress was considering the legislation that became the Administrative Procedure Act of 1946, the FTC stated that it neither had nor desired substantive rulemaking power. *Hearings on Administrative Procedure Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 1st Sess., at 283-311 (1941).

sion (see p. 7, *supra*). What Judge Wright makes reference to is the language of Section 6(g) of the FTC Act, which empowers the Commission "[f]rom time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act." To say that this statutory language on its face authorizes substantive rulemaking requires a quantum leap of analysis which cannot be performed even with the aid of the plain meaning doctrine of statutory interpretation. Indeed, if anything is "clear" or "plain" from the wording of Section 6(g), it is that the language on its face contains no specific reference to "substantive" rulemaking.

An examination of the language of Section 6(g) and its place in the overall structure of the statute dictates a conclusion just the opposite from that which Judge Wright urges. Section 6(g) is part of the section of the FTC Act which itemizes the various investigative and related "housekeeping" powers of the Commission, as distinguished from its enforcement powers, which are contained in the preceding Section 5. Thus, as the District Court rightly pointed out, "both the context of Section 6(g) and the legislative history accompanying it demonstrate that this particular authority [substantive rulemaking] was not, nor has it been, granted" (A-19).

The legislative history referred to by the District Court shows that both houses of Congress, in enacting the FTC Act in 1914, were not only fully aware of the distinction between administrative enforcement by adjudication on the one hand and by substantive rulemaking on the other, but that they specifically refused to grant substantive rulemaking authority to the FTC and created the Commission as a quasi-judicial agency empowered to enforce the statute only by way of administrative adjudication (see A-19-22).

In trying to explain away this legislative history, Judge Wright engages in a tortuous reasoning process that

defies comprehension. While characterizing the Congressional history as "ambiguous" (A-54, 55, 68, 78), Judge Wright admits, as he must, that the separate bills that emerged from the two houses of Congress did not authorize the Commission to make substantive rules of law (A-86-90). Thus, Judge Wright is reduced to making the argument that substantive rulemaking power was somehow added to the legislation by the Conference Committee (A-89-91). But this argument cannot withstand analysis. In the first place, the Conference Committee merely adopted the language which is now contained in Section 6(g) of the Act from a comparable provision of the House bill, which Judge Wright's opinion acknowledges conferred no substantive rulemaking power (A-79, 89-90). Secondly, the Conference Report, as Judge Wright also admits, says nothing about the addition of any substantive rulemaking power to the statute (A-90-91). Thirdly, even if the Conference Committee had wanted to add substantive rulemaking power to the compromise bill, it was not authorized to do so under the parliamentary rules of Congress which prohibit a conference committee from including new legislation which has not been passed by one of the two houses (A-20, n. 12). Judge Wright's opinion recognizes this point, but dismisses it with the mystifying statement that "while this general principle of germaneness as to the powers of a conference may bind Congress, it has never bound the courts . . . ," citing *Cf. St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 221-22 (1961) (A-90-91).

But that case holds just the contrary. In *St. Regis*, the Supreme Court ruled that in interpreting changes made by a conference committee, the courts must assume that the conference committee included the same or substantially similar provisions as contained in the bills which it undertook to reconcile; and if the conference committee goes outside the bills, it must report such a change back to the House and Senate. As this Court stated in *St. Regis*:

> "If the conference had intended to give the Commission a separate, new power which was not included in either the House or Senate bill, surely there would be some mention of it in the reports by the managers." 368 U.S. at 222.

In the case of the 1914 FTC legislation, the reports by the conference managers contained no reference to the addition of substantive rulemaking power to the FTC Act (CA App. 386-403); and indeed the managers explicitly negated any such intention by assuring Congress that the Conference Committee bill was "within the limits of conference" (50 CONG. REC. 14925; also 14769 and A-90).

Lastly, in the post-conference bill debates, the leaders of the legislation reiterated their prior views that the FTC's enforcement authority did not encompass legislative-type, substantive rulemaking proscribing future conduct, but was limited to adjudication requiring entry of orders after complaint, hearing and findings of fact (51 CONG. REC. 14768-70, 14928, 14938, 14934). To give but one example, Representative Covington, who was one of the conference managers, stated in the final debates in the House:

> "The Federal trade commission will have no power to prescribe the methods of competition to be used in [the] future. In issuing its orders it will not be exercising power of a legislative nature. The basis, therefore, upon which the validity of the 'narrow' court review provided by the [ICC's] Hepburn Act [of 1906] rests will be lacking.
>
> "The function of the Federal trade commission will be to determine whether an existing method of competition is unfair, and, if it finds it to be unfair, to order the discontinuance of its use. In doing this it will exercise power of a judicial nature. Under the Constitution power to act finally in a judicial capacity can be conferred only upon a court." 51 CONG. REC. 14932.

The events which have occurred since the enactment of the 1914 Act fully confirm that Congress did not grant substantive rulemaking power to the Commission. The Commission itself during the first 50 years of its administration of the Act never sought to exercise legislative-type rulemaking authority. Neither did Congress believe that the FTC possessed substantive rulemaking power, for (as noted earlier at 13, *supra*) when it decided to confer legislative-type rulemaking authority on the Commission in a series of new laws enacted from 1939 through 1967 dealing with product labeling and packaging, subjects peculiarly fit for rulemaking, it specifically provided in those acts that the Commission was authorized to issue substantive rules and regulations with respect to those products. Similarly, in the nearly 60 years since the passage of the FTC Act, Congress has also expressly endowed various other federal regulatory agencies with substantive rulemaking powers; and in each such case, Congress has limited that grant of rulemaking power to agencies regulating specific industries (see pp. 12-13, *supra*).

Any one of the above-described post-enactment events might not in and of itself be conclusive on the question of Congressional intent, but taken together they certainly provide compelling evidence, when viewed in light of the language of the Act and its legislative history, that Congress did not grant substantive rulemaking power to the Commission.[9]

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[9] The leading legal scholars who have examined the FTC Act of 1914 and its legislative history have concluded that Congress did not confer legislative-type substantive rulemaking on the FTC. *See* Burrus & Teter, *Antitrust: Rulemaking* v. *Adjudication in the FTC*, 54 GEO. L.J. 1106, 1125-27 (1966); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 490 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 960 (1965); Weston, *Deceptive Advertising and the*

Perhaps the result reached by the three-judge panel below is understandable only in terms of the arguments of expediency that Judge Wright makes throughout the opinion. Thus, it is stated over and over again in the opinion that substantive rulemaking is desirable or needed by the Commission to discharge effectively and fairly its statutory mandate (A-46-55, 62-64, 68, 71, 76-77). Not only does the Court below stress the administrative advantages of "efficiency," "expedition" and "certainty," which it claims inhere in rulemaking, but it invokes "contemporary considerations of practicality and fairness" as well (*see, e.g.*, A-40, 49, 63-64, 66-68, 71).

Whatever the merits of such policy arguments, they should be addressed to Congress, not to the courts. *See, e.g., Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687-88 (1962). For the courts to imply a major enforcement power such as substantive rulemaking based on legislative considerations is not only improper but unwise, because courts simply cannot fashion the necessary limitations and procedural protections. *See, e.g., Holloway* v. *Bristol-Myers Corp., supra*, 1973-2 Trade Cases at 94,751. This fact is highlighted in this case, where the rulemaking power implied by the Court below is unlimited in scope and contains no procedural safeguards or appeal procedures, since the statute is silent on these points. Recognizing the problem but having no answer, Judge Wright simply states at the conclusion of his opinion that should the unlimited rulemaking power which the Court found to be "implied" in the statute be "too broad or lack sufficient safeguards," then it is up to Congress "to make

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Federal Trade Commission: Decline of Caveat Emptor, 24 FED. B.J. 548, 570 (1964).

See also, HART, REPORT OF THE PRESIDENT'S COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 332 (1937) ("the Federal Trade Commission has no rulemaking power"); Massel, *The Regulatory Process*, 26 LAW & CONTEMP. PROB. 181, 189 (1961); Note, GEO. WASH. L. REV. 330 (1972).

the required changes" (A-76, n. 40). Nor is it consonant with the proper judicial function for a reviewing court to say (as was done below) that it may render its "independent judgment" on the meaning of a statute on the theory that if Congress believes the Commission "exercises too much power," then it "will repeal the grant" (A-75, note omitted).

Everything that Judge Wright says in praise of substantive rulemaking by administrative agencies may well be true, although there may be a tendency to exaggerate the benefits of rulemaking vis-a-vis adjudication. The critical point here, however, is that it is not the function of a reviewing court to decide what enforcement powers the FTC should have but only what enforcement powers have been given to it by the Congress. In short, what this case calls for is a judicial determination, not a legislative or ideological judgment.

III

THIS COURT NEEDS TO SETTLE THE CONTINUING CONTROVERSY AND CONFUSION ABOUT THE AUTHORITY OF THE COMMISSION TO ISSUE SUBSTANTIVE RULES HAVING THE EFFECT OF LAW

In May 1962, when the Commission first indicated that it was going to enforce the prohibitions of Section 5 by substantive rulemaking, it did so in a tentative fashion without clearly defining the effect of the rules (27 Fed. Reg. 4636, 4796). As the Court below pointed out, for some time after May 1962 "the actual effect of these rules and the Commission's view of whether they were merely to be viewed as interpretive or statutorily based and thus determinative of the questions to be litigated in § 5 proceedings remained unclear" (A-71, n. 29).

In addition, the Commission's first ventures into substantive rulemaking were marked by caution and reflected concern over its authority to proceed as well as sensitivity

to political considerations. Initially, the Commission promulgated trade regulation rules involving relatively minor business practices of small industries such as the size of sleeping bags (16 C.F.R. § 400, effective November 12, 1963), the leather content of waist belts (16 C.F.R. § 405, effective January 1, 1965), and the size of tablecloths (16 C.F.R. § 404, effective February 1, 1965). Later, the Commission promulgated rules applicable to more important business practices of large industries such as cigarette labeling (29 Fed. Reg. 530, 8324, 12626, 15570, 30 Fed. Reg. 9484; preempted by 15 U.S.C. § 1331, *et seq.*), games of chance in the food-retailing and gasoline industries (16 C.F.R. § 419), and the instant Octane Posting Rule. More recently, the Commission announced intentions to promulgate trade regulation rules regulating the multi-billion dollar franchise business (36 Fed. Reg. 21607, 22187) and abolishing the centuries-old "holder in due course" doctrine for negotiable instruments in consumer credit transactions (36 Fed. Reg. 1211).

As the Commission moved into more controversial areas, the dispute over its statutory authority to promulgate substantive rules intensified. On three occasions, Congress passed statutes superseding Commission trade regulation rules.[10] On two other occasions, lawsuits challenging the Commission's rulemaking authority were instituted but were later dismissed for lack of ripeness. *Bristol-Myers Co.* v. *FTC*, 284 F.Supp. 745 (D.D.C. 1968), *aff'd in pertinent part*, 424 F.2d 935 (D.C.

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[10] A trade regulation rule involving unsolicited mailing of credit cards (35 Fed. Reg. 4614, effective May 18, 1970) was superseded by express provisions of the Truth-In-Lending Act (15 U.S.C. §§ 1642, *et seq.*); a rule involving advertising and labeling of cigarettes (29 Fed. Reg. 530, 8324, 12626, 15570, 30 Fed. Reg. 9484) was preempted by the Federal Cigarette Labeling and Advertising Act (15 U.S.C. §§ 1331, *et seq.*); and a proposed rule relating to shipment of unordered merchandise (35 Fed. Reg. 10116, 14328) was superseded by express provisions of the Postal Reorganization Act (39 U.S.C. § 3009).

Cir.), *cert. denied*, 400 U.S. 824 (1970); *Lever Bros.* v. *FTC*, 325 F.Supp. 371 (D. Me. 1971).

Beginning almost as soon as the Commission announced its intention to promulgate binding rules, Congress has been concerned with the question of whether the Commission should have substantive rulemaking power. In 1966, Congress enacted the Fair Packaging and Labeling Act, conferring limited rulemaking powers on the Commission in reliance on explicit representations made by the Chairman of the FTC in hearings held in 1963 that the Commission lacked such enforcement power (A-71, note 29).[11] Later, in 1967, the Flammable Fabrics Act of 1953 was amended to confer specific substantive rulemaking authority on the Commission (81 Stat. 571). Then, in 1969, a bill was introduced in the Senate to confer express substantive rulemaking power to enforce the prohibitions of Section 5 (S. 3201, 91st Cong., 2d Sess.). Since that time, numerous other bills have been introduced in both the House and the Senate, all meeting with varying degrees of success (H.R. 4809, S. 986, 92d Cong., 1st Sess.; H.R. 20, H.R. 7917, S. 356, 93d Cong., 1st Sess.). Each of these bills has involved a more limited grant of substantive rulemaking power than that inferred by the Court of Appeals below. Moreover, each of these bills has contained to a greater or lesser degree procedural safeguards including cross-examination, sworn testimony, the substantial evidence rule and direct judicial review. One of these bills was withdrawn earlier this year pending the outcome of this litigation (see S. REP. No. 93-151, 93d Cong., 1st Sess. 32 (May 1973)). Another of these bills was recently reported out of the

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[11] *Hearings on S. 387 Before Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess., at 281-82 (1963). *See also* a later statement to the same effect by FTC Chairman Dixon, *Hearings on H.R. 15440 Before House Interstate & Foreign Commerce Comm.*, 89th Cong., 2d Sess., at 990 (1966).

House Commerce Subcommittee and is currently before the full Commerce Committee (H.R. 7917).

Congress' uncertainty and confusion in this area has been shared by those persons and companies affected by the FTC's outstanding trade regulation rules as well as its publicly announced proposed rules. In connection with a trade regulation rule involving door-to-door sales, the Commission announced in October 1972 that this litigation created such uncertainty that the effective date of the rule would be deferred indefinitely (37 Fed. Reg. 22961). Rules which had been proposed and finalized prior to the District Court's opinion in this case have all experienced some measure of deferral or suspension as a result of the litigation (see 4 TRADE REG. REP. ¶¶ 38,029-32 (1973)). Moreover, rules which had been finalized with existing effective dates have all been cast into a status of doubt by the opinion. There can be no question that if this Court fails to resolve this issue now, further challenges to the FTC's substantive rulemaking power will result; and uncertainty and confusion will continue, with the accompanying legal cloud hanging over any trade regulation rule which the Commission may issue or seek to enforce.

CONCLUSION

Since this case squarely presents the fundamental legal issue of whether Congress has granted the FTC substantive rulemaking authority, and since this issue needs to be resolved now, we submit that this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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